

FINDINGS OF FACT AND CONCLUSIONS OF LAW

agreement, which is identified as a license agreement.¹ In that agreement, claimant agreed to dance at respondent's establishment, although without any monetary compensation from respondent. But claimant was allowed to keep all gratuities she received from respondent's customers while dancing. The terms of the license agreement specify that claimant is an independent contractor and not an employee, and that respondent will not be responsible for state, federal income or FICA taxes with regard to the gratuities received by claimant.

Claimant was required to provide all of her own equipment, including music, sound equipment and dance costumes. However, respondent did provide the opportunity for claimant to rent dance music and sound equipment from respondent. Claimant was obligated to avoid any illegal activities during her dancing and required to follow all city, county and state laws with regard to her dancing activities.

Claimant alleges that on December 31, 2004, while dancing, an intoxicated patron threw a pitcher of beer at her, striking her on the leg. The beer spilled on the dance floor and claimant, who was wearing stiletto heels at the time, slipped, grabbing the dance pole to keep herself from falling to the floor. Claimant testified to feeling a minor sensation at that time, but experienced no significant pain. However, the next morning, claimant felt significant pain.

Claimant first sought medical treatment with R. Jerry DeGrado, D.C., on January 3, 2005. At that time, she had low back pain. Claimant was off work until January 7, 2005, at which time Dr. DeGrado released claimant to return to work. Claimant appeared at the Wesley Medical Center emergency room on January 20, 2005, reporting that she awoke that morning unable to move her legs. The medical reports indicate claimant's legs felt like dead weight. The medical report of January 20, 2005, indicates that claimant cleaned her house the night before without any pain or problems, but awoke that morning with significant difficulties.

Claimant underwent conservative medical care at Wesley Medical Center, undergoing an MRI which displayed a mild disc bulge at L5-S1. The MRI indicated a central bulge, with no canal compromise and minimal loss of L5-S1 disc space height.

Claimant has since terminated her contract with respondent, although the circumstances surrounding that termination are not contained in this record.

Respondent's representative Lisa Ward, who was identified as respondent's manager, testified in this matter regarding claimant's allegations of a work-related accident. She testified that claimant signed the agreement as an independent contractor and not an

¹ P.H. Trans., Resp. Ex. 1.

employee. Respondent was not responsible for taking out employment taxes and only directed claimant to appear at the time she was scheduled and not violate any local or state laws with regard to her dancing activities. Ms. Ward testified that the first time she was made aware of claimant's allegation of a fall or near fall on stage was at the time of the preliminary hearing on March 8, 2005.

Ms. Ward acknowledged that dancers who do not show at their designated times are fined or docked, but she went on to state that there is no way for respondent to force them to pay, as they were not employees. They would simply ask the dancer to leave and not return, should a difficulty with scheduling arise.

Ms. Ward also testified that the disc jockey who plays for the various dancers keeps a running log of when the dancers are scheduled and when they actually dance, since he is the one responsible for providing their dance music, should they be so inclined to use his equipment and materials. On December 31, 2004, the day claimant alleges an injury, Ms. Ward testified that claimant was listed as a no-show, having failed to appear at her designated dance time. She then noted that claimant was absent until January 7, 2005, at which time claimant purchased an outfit, but there was nothing recorded to indicate that claimant danced on January 7. The record does not indicate when claimant next appeared at respondent's establishment to dance, and claimant's testimony does not clarify other than indicating, as of the preliminary hearing, she had terminated her relationship with respondent.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.²

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are elements pertaining to both relationships which may occur without being determinative of the relationship.³ There is no absolute rule for determining whether an individual is an independent contractor or an employee.⁴ The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁵

² K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

³ *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

⁴ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

⁵ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.⁶

In addition to the right to control and the right to discharge the worker, the other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price.
2. The independent nature of the worker's business or distinct calling.
3. The employment of assistants and the right to supervise their activities.
4. The worker's obligation to furnish tools, supplies and materials.
5. The worker's right to control the progress of the work.
6. The length of time that the worker is employed.
7. Whether the worker is paid by time or by job.
8. Whether the work is part of the regular business of the employer.⁷

Based upon all of the above, the Board determines for the purposes of the Workers Compensation Act that claimant should be considered an independent contractor. The Board notes claimant was performing at this establishment without any sort of compensation being provided by respondent. Claimant's only source of income came from the tips she generated from the customers. Respondent took out no state or federal taxes from her income, and the only control that respondent exercised over claimant was that she be available at the times scheduled and that she not violate any state or local laws while performing her dances.

⁶ *Wallis* at 102-103.

⁷ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

While the Board acknowledges that there were certain fines which respondent would assess should claimant fail to appear, the evidence in this record indicates that these fines, while assessable, were not collectible as respondent had no way to deduct any funds from claimant, as she was not being paid for any of her dancing activities by respondent. Additionally, claimant was required to provide all of her tools, supplies and materials, or she could rent those from respondent. Finally, the Board notes claimant was not advised how to perform her dancing activities, other than being cautioned to obey the law.

Respondent contends that dancing is not an integral part of its business, arguing instead that its business is the furnishing of alcoholic beverages. While the Board understands that furnishing alcoholic beverages may provide the income to respondent, in these types of establishments, in many cases, it is the dancers that bring the patrons in the door. The Board rejects respondent's argument in this regard, but finds the overall weight of the evidence supports respondent's contention that claimant is an independent contractor for the purposes of the Kansas Workers Compensation Act. The Board, therefore, finds that the Order of the ALJ awarding claimant benefits should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated March 8, 2005, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director